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00-1081

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

GARY SUDDUTH,

Petitioner,

vs.

JIMMY STEGALL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CRAIG A. DALY, P.C. (P27539)
Attorney of Record for Petitioner
577 E. Larned, Suite 240
Detroit, Michigan 48226
(313) 963-1455

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

DID THE SIXTH CIRCUIT AND DISTRICT JUDGE DENY PETITIONER HIS RIGHT TO DUE PROCESS WHEN THEY DENIED A CERTIFICATE OF APPEALABILITY FROM THE DISTRICT COURT'S DENIAL OF A WRIT OF HABEAS CORPUS UNDER 28 USC § 2254 ON BOTH PROCEDURAL AND SUBSTANTIVE GROUNDS, RELYING ERRONEOUSLY ON THIS COURT'S DECISION IN *SLACK V MCDANIEL*, 529 US 1595 (2000)?

PARTIES TO THE PROCEEDING

Petitioner GARY SUDDUTH is a state prisoner serving a non-parolable life sentence in the State of Michigan.

Respondent JIMMY STEGALL is the Warden of the state facility responsible for Petitioner's legal custody.

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
THE SIXTH CIRCUIT AND DISTRICT JUDGE DENIED PETITIONER HIS RIGHT TO DUE PROCESS WHEN THEY DENIED A CERTIFICATE OF APPEALABILITY FROM THE DISTRICT COURT'S DENIAL OF A WRIT OF HABEAS CORPUS UNDER 28 USC § 2254 ON BOTH PROCEDURAL AND SUBSTANTIVE GROUNDS, RELYING ERRONEOUSLY ON THIS COURT'S DECISION IN *SLACK V MCDANIEL*, 529 US 1595 (2000)	4
CONCLUSION	10
APPENDIX	A1

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V..... 2

FEDERAL CASES

Barefoot v Estelle, 463 US 880 (1983)..... 5

Barker v Yukins, 199 F3d 867 (6th Cir, 1999)..... 7

Brecht v Abrahamson, 507 US 619 (1993)..... 10

Chambers v Mississippi, 410 US 284 (1973)..... 7

Crane v Kentucky, 476 US 683 (1986)..... 7

Darden v Wainwright, 477 US 161 (1986)..... 9

Donnelly v Dechristoforo, 416 US 637 (1974)..... 9

Hohn v United States, 524 US 236 (1998)..... 2

Huddleston v United States, 485 US 681 (1988)..... 9

Lozada v Reeds, 498 US 430 (1991)..... 5

Lyons v Ohio Adult Parole Authority, 105 F3d 1063 (6th Cir, 1997)..... 5

Slack v McDaniel, 529 US 1595, 120 S Ct 1595 (2000)..... 1, 4, 5, 6, 10

Sonner v Johnson, 161 F3d 941 (5th Cir, 1998)..... 5

United States v Brainard, 690 F2d 1117 (4th Cir, 1982)..... 7

STATE CASES

People v Barrera, 451 Mich 261 (1996)..... 7

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 USC § 1254(1) 2

28 USC § 2253 ..... 2, 5

28 USC § 2254 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner GARY SUDDUTH respectfully requests that a Writ of Certiorari issue to review the Order of July 12, 2000 of the United States Court of Appeals from the Sixth Circuit, denying Petitioner's Application for a Certificate of Appealability from the District Court's judgment dismissing his Petition for Writ of Habeas Corpus under 28 USC § 2254 and July 21, 2000 Order denying rehearing, so that Petitioner may proceed with his appeal.

OPINIONS BELOW

On March 29, 2000, the Honorable Paul D. Borman, United States District Judge for the Eastern District of Michigan, Southern Division, issued a Judgment and Opinion and Order denying Petition for Writ of Habeas Corpus (Appendix, Exhibit A). On May 5, 2000, the District Judge entered an Order Granting in Part and Denying in Part a Certificate of Appealability (Appendix, Exhibit B). On May 24, 2000, the Sixth Circuit Court of Appeals issued an Order remanding to the District Court for reconsideration of the Certificate of Appealability in light of *Slack v McDaniel*, 529 US 1595 (2000) (Appendix, Exhibit C). On May 26, 2000, the District Court entered an Order Denying a Certificate of Appealability (Appendix, Exhibit D). On June 7, 2000, the District Court denied a Motion for Reconsideration (Appendix, Exhibit E). On July 12, 2000, the Sixth Circuit Court of Appeals issued an Order Denying the Application for Certificate of Appealability on all issues without any explanation (Appendix,

Exhibit F). On July 21, 2000 a Petition for Rehearing was denied (Appendix, Exhibit G).

The District Court and The Sixth Circuit Court orders denying a Certificate of Appealability give rise to this petition.

STATEMENT OF JURISDICTION

After the District Court's Judgment and Opinion and Order on March 29, 2000, dismissing the Petition for Writ of Habeas Corpus, a timely Notice of Appeal was filed on April 20, 2000. On May 26, 2000, the District Court denied a Certificate of Appealability. On July 12, 2000, the Sixth Circuit Court of Appeals denied a Certificate of Appealability. On July 21, 2000, the Circuit Court denied a timely Petition for Rehearing. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 USC § 1254(1) and the authority of *Hohn v United States*, 524 US 236 (1998).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V: "No person shall be held to answer for a (crime) . . . without due process of law."

The Antiterrorism and Effective Death Penalty Act of (1996) (AEDPA), 28 USC § 2253(c)(1) provides:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255,

Certificates of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 US § 2253(c)(2).

STATEMENT OF THE CASE

Procedural History

Petitioner GARY SUDDUTH, a state prisoner, is serving a non-parolable life sentence and a current term of six (6) to ten (10) years and consecutive two (2) year term in the State of Michigan for a first degree murder conviction, assault conviction and firearm offense. A Petition for Writ of Habeas Corpus, pursuant to 28 USC § 2254, was filed in the Eastern District of Michigan, Southern Division. Petitioner alleged he was being deprived of his liberty in violation of the United States Constitution because: (1) the state trial judge had prevented him from introducing the Co-defendant's statement made in open court that he alone had committed the crime; and (2) the prosecutor's misconduct in introducing evidence of Petitioner's alleged uncharged narcotics activity deprived him of a fundamentally fair trial. The District Court

issued an opinion and order denying the petition on state procedural default grounds and after reaching the merits of the petition, concluded that the claims were without merit. The District Court initially granted a Certificate of Appealability on the issue of the trial court's refusal to admit the Co-defendant's admission. However, upon remand by the Circuit Court for consideration under *Slack v McDaniel, supra,* the District Court denied the Certificate of Appealability. The Circuit Court also denied a Certificate of Appealability.

Petitioner has made a substantial showing of the denial of his constitutional right to present a defense, due process and a fair trial. The District Court was in error in denying a Certificate of Appealability based on the *Slack* opinion because the requirements of *Slack* apply *only* when the petition is dismissed on procedural grounds *without reaching the petitioner's underlying constitutional claim(s).*

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT AND DISTRICT JUDGE DENIED PETITIONER HIS RIGHT TO DUE PROCESS WHEN THEY DENIED A CERTIFICATE OF APPEALABILITY FROM THE DISTRICT COURT'S DENIAL OF A WRIT OF HABEAS CORPUS UNDER 28 USC § 2254 ON BOTH PROCEDURAL AND SUBSTANTIVE GROUNDS, RELYING ERRONEOUSLY ON THIS COURT'S DECISION IN *SLACK V MCDANIEL*, 529 US 1595 (2000).

A. STANDARD FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs the issuance of a Certificate of

Appealability (COA) by requiring the applicant to make a substantial showing of the denial of a constitutional right. 28 USC § 2253(1)(B)(3). In *Slack v McDaniel*, 529 US 1595 (2000), this Court held that the statutory provision is a codification of the previous Certificate of Probable Cause standard announced in *Barefoot v Estelle*, 463 US 880, 894 (1983). Therefore, a habeas petitioner makes a substantial showing of a denial of a constitutional right when the issues are debatable among jurists of reason and that the petition could have been resolved in a different manner *or* that the issues presented are adequate to deserve further review. *Id*, 463 US at 893; *Lozada v Reeds*, 498 US 430 (1991).

The purpose of both the Certificate of Probable Cause and Certificate of Appealability is to prevent frivolous appeals. "In order to prevent frivolous appeals, Congress has long required those state prisoners whose habeas corpus petitions are denied in federal district court obtain a certificate of probable cause before appealing that denial." *Lyons v Ohio Adult Parole Authority*, 105 F3d 1063, 1066 (6th Cir, 1997); citing *Barefoot v Estelle, supra*. Preventing frivolous appeals is not synonymous with requiring a petitioner to prove that he or she would win the appeal. It is merely an initial screening device. Thus, the granting of a certificate of probable cause essentially means that the appeal is not "frivolous" and that the issues presented are subject to debate. *Lozada v Reeds, supra; Barefoot v Estelle, supra*. Any doubt about whether a petitioner is entitled to a Certificate of Appealability is resolved in favor of the request. *Sonner v Johnson*, 161 F3d 941, 944 (5th Cir, 1998).

In *Slack v McDaniel, supra,* the Court held that when the district court denies a Petition for Writ of Habeas Corpus on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. When the district court denies relief on procedural grounds without reaching the underlying constitutional claims, a Certificate of Appealability should issue when the petitioner shows, minimally, that jurists of reason would find it debatable whether the petition states a valid claim of a denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

In the present case, the District Court dismissed the petition after reaching the merits of the case, and on state procedural default grounds. Thus, the District Court's denial of the Certificate of Appealability on the basis of the two-fold requirement was clearly erroneous. In short, reasonable jurists would find the district court's conclusion on the constitutional claims debatable, if not wrong, or, at least the issues are adequate for further review.

B. BIAS' EXCULPATORY STATEMENT IN OPEN COURT.

On December 3, 1992, Petitioner and his Co-defendants, R.J. Bias, Marvin Smoot and Tracy Shelton, appeared in open court for a calendar conference. When discussing motion dates and deadlines, Bias told the judge that "This was going too far" because he alone committed the murder and the Co-defendants "had nothing to do with it" and it made no sense to "take three

people down with me who had nothing to do with it." Bias acknowledged that his lawyer did not want him to say what he just said. The trial court also acknowledged that what Bias said may be true. The prosecutor subsequently used Bias' statement in his trial to convict him.[1] The District Court concluded that Bias' statement was unreliable and the exclusion at Petitioner's trial was harmless in any event. That conclusion ignores Petitioner's fundamental right to present witnesses in his own behalf and a full defense. *Crane v Kentucky*, 476 US 683, 691 (1986); *Chambers v Mississippi*, 410 US 284, 296, 302 (1973).[2] Also, the District Court's conclusion violates Petitioner's right to a trial by jury and is an unreasonable application of the harmless error rule. *Barker v Yukins*, 199 F3d 867 (6th Cir, 1999), *cert denied*, ___ US ___, 120 S Ct ___, 147 L Ed 2d 273 (2000).

In the present case, Petitioner's claim that Bias took his gun and fired at the deceased was significantly impeded and his right to present a defense was severely prejudiced, when the trial court excluded Bias' corroborating statement. It was for the jury alone, to decide the validity of Bias' statement, and give it the weight they felt it deserved. The trial court's ruling effectively deprived Petitioner of his right to a jury trial. Moreover, Bias'

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[1] "The confession was reliable enough to be used to put [the declarant] away for the rest of his life, and no reason is suggested why . . . it would be reliable evidence of [the defendant's] innocence as well." *United States v Brainard*, 690 F2d 1117, 1125 (4th Cir, 1982).

[2] Likewise, the trial court's ruling in this case is directly contrary to the Michigan Supreme Court's ruling in *People v Barrera*, 451 Mich 261 (1996).

statement was given under circumstances that made it reliable. In this case, the District Court's assessment of the merits of the case required the court to make a judgment about the reliability of Bias' statement in open court. Although a reasonable jurist could agree with the District Court, a jurist of reason could find the merits debatable as it requires a case-by-case analysis. A jurist of reason could conclude that Bias' statement was trustworthy because:

(A) there was no question Bias, in fact, made the statement.

(B) the statement was made spontaneously in open court to the trial judge.

(C) the trial judge did *not* reject Bias' statement as being untrue at the time.

(D) there is no self-serving part to Bias' statement.

(E) the statement subjected Bias to a mandatory life term in prison.

(F) Bias did not seek to curry favor with the police by making the statement.

(G) Bias' statements give recognition to the gravity of his admission; he acknowledged that his lawyer did not want him to make the statement.

(H) the prosecution, convinced of the reliability of Bias' statement, used it against him in his trial.

(I) The case law which formed the basis for the trial court's ruling excluding the statement was subsequently reversed by the Michigan Supreme Court.

At trial, there was a conflict between the prosecution and the defense about whether Petitioner fired the fatal shots. With Bias' statement to consider, Petitioner's version of the events was far more credible and believable with Bias' statement.

C. PROSECUTORIAL MISCONDUCT

There are clearly established rules regarding the use of other criminal activity of the defendant. Notice in advance must be filed and the specific purpose of the proposed evidence must be identified. There can be no question that the use of evidence of other crimes can create unfair prejudice to the extent that a defendant is denied a fair trial. When the prosecutor uses evidence of a crime not charged, a defendant is entitled to habeas relief if that evidence deprives the defendant of a fundamentally fair trial. *Darden v Wainwright*, 477 US 161, 181 (1986); *Donnelly v Dechristoforo*, 416 US 637, 643 (1974).

The District Court erroneously concluded that "other crimes as evidence of his guilt with regard to this murder presents a question of Michigan evidentiary rules and cannot form the basis for federal habeas relief" (Op., p. 14). There was no state evidentiary ruling on this issue and the question addresses the prosecutor's improper use of the evidence. The District Court then concluded that the evidence was admissible to prove motive. Motive is not an element of murder. More importantly, the relevancy is tenuous at best because there was no legitimate basis to offer Petitioner's alleged drug dealing because the deceased only owed Bias money for an alleged drug debt. This evidence was inadmissible. *Huddleston v United*

States, 485 US 681 (1988). The prosecutor also went beyond an isolated introduction of this evidence. She misled the jury in her closing argument, claiming *Petitioner* was concerned by the loss of drug profits. The introduction of Petitioner's alleged drug dealing had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v Abrahamson*, 507 US 619, 637 (1993). Finally, since the lower court ruled that resolution of the procedural default issue was debatable among reasonable jurists, that portion of the *Slack* standard has been met.

CONCLUSION

In summary, Petitioner has made the necessary showing for a Certificate of Appealability and this Court should grant a Writ of Certiorari.

Respectfully submitted,

CRAIG A. DALY, P.C. (P27539)
Attorney for Petitioner
577 E. Larned, Suite 240
Detroit, Michigan 48226
(313) 963-1455

Dated: October 9, 2000

No. _____

In The

Supreme Court of the United States

GARY SUDDUTH,

Petitioner,

vs.

JIMMY STEGALL,

Respondent.

APPENDIX

TABLE OF CONTENTS

Page

EXHIBIT A Opinion and Order denying Petition for Writ of Habeas Corpus and Judgment, dated March 29, 2000.....App. 1

EXHIBIT B Order Granting in Part and Denying in Part a Certificate of Appealability, dated May 5, 2000.....App. 21

EXHIBIT C Order of Sixth Circuit Court of Appeals, dated May 24, 2000.....App. 25

EXHIBIT D Order Denying a Certificate of Appealability, dated May 26, 2000.....App. 27

EXHIBIT E Order Denying Motion for Reconsideration, dated June 7, 2000.....App. 31

EXHIBIT F Order of Sixth Circuit Court of Appeals, dated July 12, 2000.....App. 34

EXHIBIT G Order of Sixth Circuit Court of Appeals, dated July 21, 2000.....App. 35

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GARY SUDDUTH,

Petitioner,

v.

JIMMY STEGALL,

Respondent.

_____/

Case No. 99-CV-73898-DT
PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Gary Sudduth, ("petitioner"), presently confined at the Macomb Correctional Facility in New Haven, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, filed through retained counsel Craig A. Daly, petitioner challenges his conviction on one count of first-degree felony murder, M.C.L.A. 750.316; M.S.A. 28.548; one count of assault with intent to do great bodily harm less than murder, M.C.L.A. 750.84; M.S.A. 28.279; and one count of possession of a firearm in the commission of a felony, M.C.L.A. 750.227b; M.S.A. 28.424(2). For the reasons stated below, petitioner's application for writ of habeas corpus is **DENIED**.

BACKGROUND

Petitioner was charged with R.J. Bias, Marvin Smoot, and Tracy Shelton with the shooting death of Juanita

Smith in Detroit, Michigan on November 11, 1992. Petitioner was jointly tried with Smoot but before separate juries and was found guilty of the above offenses.

Nathaniel Hardrick testified that he lived with Smith and their baby in a house on Hendrie Street in Detroit on the night of the murder. At 2:30 a.m on November 11, 1992, Hardrick heard the doorbell ring, went to the door, and observed R.J. "Chill" Bias, who was Smith's cousin, standing outside the door. When Hardrick opened the door, Bias and three other men, including petitioner, rushed into the house carrying guns. Petitioner was carrying a .380 pistol and Smoot and Shelton had shotguns. After Bias asked for Smith, Hardrick went into a back bedroom and brought her out. Bias grabbed a shotgun from Shelton and pointed it at Hardrick and Smith. Petitioner pointed his pistol at Hardrick and Smoot pointed his shotgun at Smith. Bias asked Smith where his six hundred ($ 600.00) dollars was and told her that if he did not get his money, that somebody was going to die. Hardrick offered petitioner the television set but his offer was refused. Shortly thereafter, petitioner fired a shot into the kitchen and stated that he was going to get something tonight.

After this first conversation concluded between Bias and Smith, petitioner, Smoot, and Bias went into the living room and began whispering to one another. Petitioner and Smoot began looking through some of the rooms in the house. At one point, petitioner told Hardrick that Smith had ran off with some money. After searching the rooms, the co-defendants returned to where Smith and Hardrick were seated. Petitioner and Bias both ordered Smith to take off her jewelry. Bias took a necklace

from her and she gave her rings to petitioner. As Hardrick started to get off the couch, Bias shot him in the shoulder with the shotgun.

Hardrick and Smith began running towards the kitchen in an attempt to escape. Hardrick could hear shotgun and pistol blasts coming from behind him. Smith fell in the kitchen but Hardrick managed to run into the bathroom and shut the door. Through a hole in the bathroom door, Hardrick observed petitioner walk up to Smith. He identified petitioner based upon the white gym shoes that petitioner had been wearing. Petitioner shot into the bathroom door but missed Hardick. Petitioner then shot Smith in the back twice before telling the other co-defendants to leave the house.

Alameter Pat Walls, Smith's sister, testified that she knew Bias from purchasing crack cocaine from him. Walls had seen Bias selling crack cocaine on numerous occasions from behind a beer and wine store on Schaefer. She also testified, in response to the prosecutor's questions, that she had seen petitioner, whom she identified as "G. Money" and Smoot also selling crack with Bias at this location.[1] Walls testified that Smith had purchased crack cocaine from Bias using her welfare check to pay for drugs, as well as offering sexual favors to Bias in exchange for crack cocaine. Walls insisted that her sister did not owe any money to Bias at the time of the killing.

The autopsy revealed that Smith had received a shotgun wound to the back, a bullet wound to the forearm,

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[1] Trial Transcript, hereinafter "T", April 7, 1993, p. 317.

and two bullet wounds to the back. There was no evidence of close range firing. An evidence technician testified that a total of six .380 caliber shell casings were recovered from the scene although none were found inside of the kitchen.

Following his arrest, petitioner made a statement to Sergeant Ronald Gale of the Detroit police. Petitioner told the police that he and the three co-defendants were drinking beer and watching tapes when they decided to go over to Smith's house to get money that she owed Bias and Shelton for drugs that she had purchased from them. Petitioner indicated that Bias and Smoot were armed with shotguns. Petitioner admitted being armed with a .380 pistol. The original plan was simply to retrieve the money and no shooting was planned. However, once at the house, Smith "started mouthing off ", which upset everyone. Petitioner told the victim to take her jewelry off and Bias (Chill) snatched the chain from her. According to petitioner, Chill shortly thereafter grabbed the shotgun and shot the gun in the shoulder (of Hardrick). Hardrick and Smith got up and began running. Petitioner indicated that everyone, including him, began firing their weapons. Petitioner admitted that he shot an entire clip from the pistol, estimated by him as six or seven shots. Petitioner indicated that Bias went towards the guy [Hardrick] in back. Everyone except Bias escaped out a window and fled the scene in a car.

After the prosecution rested, the defense attempted to introduce an out of court statement made by co-defendant Bias at the calendar conference, in which he told the trial court that he committed the murder and the other

co-defendants had nothing to do with the crime.[2] The trial court ruled that Bias' hearsay statement that he acted alone was not admissible because it was not sufficiently corroborated by the other evidence. The trial court found Bias's statement to be inconsistent with the fact that at least two weapons had been used, which showed that there were at least two shooters. The court also noted that there was other evidence of participation besides the shooting.[3]

Petitioner testified in his own defense. He admitted being present at the crime scene on the night in question and further acknowledged being in possession of a .380 caliber pistol. Bias had a shotgun with him. Once at the house, Bias and Smith discussed the drug debt that she owed Bias. Petitioner admitted firing one round from the pistol at the house in the direction of the kitchen, but only did so in an effort to calm everyone down. Petitioner testified that after Bias fired the shotgun at the two victims, he grabbed the pistol from petitioner and began firing it while petitioner fled. Petitioner denied pointing a gun at anyone. Petitioner denied telling Sergeant Gale that he had fired an entire clip at the house, accusing Gale of fabricating this portion of the statement.

Petitioner also called his cousin Kobie Sudduth to testify. Kobie Sudduth had been present with petitioner and the co-defendants on the night of the murder prior to them going to Smith's house. He indicated that petitioner was wearing black gym shoes on the night in question.

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[2] Calendar Conference T., December 3, 1992, p. 6.

[3] Trial T., April 8, 1993, p. 411.

Petitioner's conviction was affirmed by the Michigan Court of Appeals. *People v. Sudduth,* 166333 (Mich. Ct. App. July 11, 1995). Petitioner did not seek leave to appeal to the Michigan Supreme Court. Petitioner thereafter raised the issues contained in this petition in a motion for relief from judgment filed pursuant to M.C.R. 6.500, *et. seq.* The Detroit Recorder's Court denied the motion. *People v. Sudduth,* Detroit Recorder's Court # 92-013418-02, Opinion dated January 21, 1997. The Michigan appellate courts denied leave to appeal. *People v. Sudduth,* 206478 (Mich. Ct. App. March 4, 1998); *lv. den.* 112035 (Mich. Sup. Ct. December 30, 1998). Petitioner now seeks the issuance of a writ of habeas corpus on the following grounds:

I. WAS PETITIONER SUDDUTH DENIED HIS DUE PROCESS RIGHT TO PRESENT EVIDENCE IN SUPPORT OF HIS DEFENSE WHEN THE TRIAL COURT EXCLUDED THE CO-DEFENDANT'S STATEMENT THAT HE ACTED ALONE IN THE DEATH OF THE VICTIM?

II. WAS PETITIONER DENIED A FAIR TRIAL BY THE PROSECUTION'S ELICITATION OF UNCHARGED CRIMES OF DRUG TRAFFICKING THAT WERE NOT RELEVANT AND CAUSED UNDUE PREJUDICE?

STANDARD OF REVIEW

28 U.S.C. § 2254(d) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

> claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *Harpster v. State of Ohio*, 128 F. 3d 322, 326 (6th Cir. 1997).

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a writ of habeas corpus may issue on the ground that a state court decision was an unreasonable application of clearly established Federal law if the unreasonableness of the state court's application of clearly established precedent is not debatable among reasonable jurists, and the unreasonableness of the application will not be debatable if it is so offensive to the precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes. *Tucker v. Prelesnik*, 181 F. 3d 747, 753 (6th Cir. 1999).

DISCUSSION

I. Petitioner's claims are procedurally defaulted because he failed to raise them in his direct appeal.

Respondent argues that petitioner's claims are procedurally defaulted because he failed to raise them in his

appeal of right, raising them instead in his post-conviction motion for relief from judgment. Petitioner contends that his claims are not procedurally defaulted because the last state court order from the Michigan Supreme Court denying the motion for relief from judgment was ambiguous because it did not articulate what provision of MCR 6.508(D) it was relying on in denying petitioner's application for leave to appeal. Petitioner further argues that this Court should not look to the trial court's opinion as being a reasoned state judgment because of serious flaws in the trial court's reasoning in denying the motion. Petitioner lastly argues that assuming any procedural default, he can establish cause to excuse the default because his appellate counsel was ineffective in failing to raise these issues in his appeal of right.

A state's reliance on procedural default constitutes an adequate and independent state ground so as to foreclose review of any federal constitutional claims. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). When the state courts clearly and expressly rely on a valid state procedural bar, federal habeas review is also barred unless petitioner can demonstrate "cause" for the default and actual prejudice as a result of the alleged constitutional violation, or can demonstrate that failure to consider the claim will result in a "fundamental miscarriage of justice". *Coleman v. Thompson*, 501 U.S. 722, 750-751 (1991).

In the present case, the Michigan Supreme Court and the Michigan Court of Appeals denied petitioner leave to appeal on the ground that he had failed to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D) without stating which subsection of the rule they were denying petitioner's claims under. The opinions of

the state appellate courts, which merely indicated that petitioner failed to establish relief from the judgment of his conviction pursuant to M.C.R. 6.508 (D) were insufficient to constitute a reasoned opinion in this matter. *Alvarez v. Straub*, 64 F. Supp. 2d 686, 693 (E.D. Mich. 1999) (Rosen, J.). If the last state court judgment is an unreasoned order simply affirming the conviction, a federal habeas court should "look through" the last order and examine the preceding reasoned order, and if that opinion explicitly relied on a procedural bar, the court should presume that the last state court judgment likewise relied on that bar. *Id.* at 692; citing to *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

In denying petitioner's motion for relief from judgment, the trial court specifically noted that petitioner contended that good cause existed to bring the motion pursuant to M.C.R. 6.508(D)(3)(a). *People v. Sudduth*, Detroit Recorder's Court # 92-013418-02, Slip. Op. at p. 2. The trial court ruled that petitioner lacked good cause as to why the issues were not raised on his direct appeal and found that petitioner's claims on actual prejudice were not persuasive. *Id.* at pp. 3-4.

In the present case, trial court expressly relied on the provisions of M.C.R. 6.508(D)(3) in its opinion[4] because it

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[4] M.C.R. 6.508(D)(3) states that a court may not grant relief to the defendant if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates:

denied petitioner relief on the ground that petitioner had failed to raise his claims on direct appeal and had failed to show good cause and prejudice. Petitioner's claims are therefore procedurally defaulted. *Richardson v. Elo*, 974 F. Supp. 1100, 1104 (E.D. Mich. 1997) (Gadola, J.). Moreover, the mere fact that the trial court erroneously assumed that petitioner was seeking a new appeal rather than a new trial does not, as petitioner suggests, alter the fact that the trial court defaulted petitioner for failing to raise these claims on his direct appeal.

Petitioner nonetheless argues that he has established cause to excuse his procedural default through the ineffective assistance of appellate counsel. Ineffective assistance of counsel can constitute cause excusing a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

However, attorney error that falls short of constitutional ineffective assistance of counsel does not constitute cause to excuse a procedural default. *Bruton v. Phillips*, 64 F. Supp. 2d 669, 682-683 (E.D. Mich. 1999) (Gadola, J.). If petitioner's ineffective assistance of appellate counsel claim lacks merit, it cannot constitute cause to excuse his default. *Sherill v. Hargett*, 184 F. 3d 1172, 1176 (10th Cir. 1999).

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel on the first

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(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

appeal by right. *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985). However, court appointed counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). An attorney's failure to present a non-meritorious issue on appeal does not constitute ineffective assistance of counsel. *Daniel v. Overton*, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994) (Gadola, J.).

In order for the ineffective assistance of appellate counsel to rise to the level of a Sixth Amendment violation, the performance of appellate counsel:

> 1. must be deficient, that is below an objective standard of reasonableness; and
>
> 2. this deficient performance must have prejudiced the defendant's appeal.

Carpenter v. Mohr, 163 F. 3d 938, 946 (6th Cir. 1998).

A review of petitioner's claims, which will be discussed below, reveals that they are without merit. Appellate counsel was therefore not ineffective for failing to raise them in petitioner's appeal of right. Petitioner has failed to establish cause to excuse his default. Moreover, even assuming that petitioner has established cause for his default, he is unable to satisfy the prejudice prong of the exception to the procedural default rule because his claims are without merit. The cause and prejudice exception is conjunctive, requiring proof of both cause and prejudice. *Cosme v. Elo*, ___ F. Supp. 2d ___; 2000 WL 246592, * 3 (E.D. Mich. 2000) (Cohn, J.); citing to *Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir.1995). Lastly, petitioner has failed to offer this Court new reliable evidence of innocence that was not presented at trial which would

excuse his default. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Petitioner's claims are procedurally defaulted.

II. Petitioner's claims are without merit and would not entitle him to habeas relief.

A. Claim # 1. Petitioner was not deprived of the right to present evidence in support of his defense when the trial court refused to admit an unreliable hearsay statement made by a co-defendant which purported to exculpate petitioner of the murder.

Petitioner first contends that the trial court deprived him of due process when she refused to allow him to introduce a statement made by co-defendant Bias at the calender conference, when he stated that he had acted alone in committing the crime and the other co-defendants had nothing to do with the commission of the crime.

An accused in a criminal case does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996); *quoting Taylor v. Illinois*, 484 U.S. 400, 410 (1988). The test for determining whether an erroneous evidentiary ruling by the state court denied a habeas petitioner a fair trial centers on whether the excluded evidence would have created a reasonable doubt that did not otherwise exist. *McLean v. McGinnis*, 29 F. Supp. 2d 83, 93 (E.D.N.Y. 1998); *aff'd* 189 F. 3d 461 (2nd Cir. 1999); *cert. denied* 120 S. Ct. 589 (1999).

In the present case, petitioner contends that he should have been permitted to present the hearsay statement of Bias into evidence because it exculpated him of the crime. In *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973), the Supreme Court ruled that the state trial court's exclusion of a third party's confession to the crime that the defendant was charged with on hearsay grounds violated due process where the circumstances revealed the confessions to be reliable. The Supreme Court found that the confessions were made under circumstances which provided "considerable assurance of their reliability" where:

> 1. each statement was made spontaneously to a close associate shortly after the murder was committed;
>
> 2. each statement was corroborated by some other evidence in the case, whether it was the declarant's sworn confession, eyewitness testimony, or evidence linking the declarant to the murder weapon;
>
> 3. each statement was against the declarant's interests; and
>
> 4. the declarant was available to be cross-examined about the out-of-court statements.

Chambers v. Mississippi, 410 U.S. at 300-301.

In the present case, the trial court excluded Bias' hearsay statement because she found that it was not sufficiently corroborated by other evidence. When a statement against interest of a witness unavailable to testify at trial is offered to exculpate an accused in a criminal case, there are three requirements for its admission:

1. the declarant must be unavailable to testify;

2. the statement must subject the declarant to real criminal liability; and

3. corroborating circumstances clearly indicate the trustworthiness of the statement.

United States v. Price, 134 F. 3d 340, 347 (6th Cir. 1998); *United States v. Hilliard*, 11 F. 3d 618, 619 (6th Cir. 1993).

A trial court does not need to be completely convinced that the exculpatory statements are true as a prerequisite to their admission; the trial court need only find that sufficient corroborating circumstances exist which indicate the statement's trustworthiness. *United States v. Price*, 134 F. 3d at 348. However, although the requirement of corroboration is "not unrealistically severe", it does go "beyond minimal corroboration." *United States v. Mackey*, 117 F. 3d 24, 29 (1st Cir. 1997). Moreover, statements such as Bias' that are of dubious exculpatory value and bear considerable indicia of unreliability can be excluded from evidence. *Turpin v. Kassulke*, 26 F. 3d 1392, 1397 (6th Cir. 1994).

In the present case, Bias' statement that he alone was involved in the murder and that petitioner had no involvement was unreliable because it was contradicted by direct evidence, which showed that more than one weapon had been used and that more than one perpetrator had been involved in the murder and the larceny. *See LaGrand v. Stewart*, 133 F. 3d 1253, 1268 (9th Cir. 1998). Petitioner's involvement in this crime was established by the sole eyewitness, his confession to the police, and his own testimony at trial. Moreover, Bias' 'bald assertion'

that petitioner and the other co-defendants were uninvolved in the murder was unsubstantiated. Bias offered no specific information exculpating petitioner and the other co-defendants. The trial court did not abuse its discretion in refusing to admit the statement into evidence. *United States v. Spring*, 80 F. 3d 1450, 1461 (10th Cir. 1996).

Moreover, irrespective of Bias' excluded statement, the evidence at trial established that petitioner's involvement in the murder was extensive. The evidence established that petitioner went with the other defendants to Smith's house to collect money that she owed Bias and Shelton for previous drug purchases. By his own admission, both to the police and at trial, petitioner went to Smith's house armed with a pistol and knowing that the other defendants, including Bias, were armed with weapons. Once at the house, petitioner actively participated in the larceny and made threats to Hardrick and Smith along with Bias. Hardrick identified petitioner as being the person who shot Smith twice in the back in the kitchen. Although petitioner denied shooting Smith in his statement to the police, he admitted that he began shooting at the victims as they fled the living room and discharged 6-7 bullets from his pistol. The police, in fact, recovered six .380 caliber bullets from the house. Even if petitioner did not actually shoot Smith, the evidence at trial would still have supported a conviction for felony murder on an aiding and abetting theory. *See People v. Turner*, 213 Mich. App. 558, 572-573; 540 N. W. 2d 728 (1995) (evidence supported a finding of malice sufficient to support a conviction for aiding and abetting a felony murder, where the defendant knew that the co-defendant

was armed with a weapon during the commission of a robbery in which the co-defendant killed the victim).[5]

In light of the substantial evidence showing that petitioner aided and abetted in the larceny and murder, any error in the exclusion of Bias' statement would be harmless error at best. *United States v. Price*, 134 F. 3d at 349; *See also United States v. Hilliard*, F. 3d at 620. Moreover, because Bias' statement was totally uncorroborated by the evidence in this case, exclusion of the statement by the trial court was not erroneous. Petitioner has failed to state a claim upon which habeas relief can be granted.

B. Claim # 2. Petitioner was not deprived of a fair trial by prosecutorial misconduct.

Petitioner next contends that the prosecutor unfairly elicited testimony from a witness that petitioner had sold crack cocaine with the co-defendants.[6] The prosecutor also mentioned the fact that petitioner and the co-defendants were selling drugs in her closing argument.[7] Petitioner contends that the prosecutor engaged in misconduct by interjecting evidence of uncharged crimes into petitioner's trial for murder, particularly where the prosecutor failed to comply with the provisions of M.R.E. 404(b)(2) which require the prosecutor to give the defense notice of an intent to use other acts evidence prior to trial.

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[5] The jury was instructed on aiding and abetting as a basis for criminal liability in this case. Trial T. April 9, 1993, pp. 550-551.

[6] Trial T. April 7, 1993, p. 317.

[7] Trial T. April 8, 1993, pp. 476, 479.

When a petitioner seeking habeas relief makes a claim of prosecutorial misconduct, the reviewing court must consider that the touchstone of due process is the fairness of the trial, not the culpability of the prosecutor. On habeas review, a court's role is to determine whether the conduct was so egregious as to render the entire trial fundamentally unfair. *Serra v. Michigan Department of Corrections*, 4 F. 3d 1348, 1355-1356 (6th Cir. 1993). In evaluating prosecutorial misconduct in a habeas case, consideration should be given to the degree to which the challenged remarks had a tendency to mislead the jury and to prejudice the accused, whether they were isolated or extensive, whether they were deliberately or accidentally placed before the jury, and, except in the sentencing phase of a capital murder case, the strength of the competent proof against the accused. *Serra v. Michigan Department of Corrections*, 4 F. 3d at 1355-1356; *See also Kincade v. Sparkman*, 175 F. 3d 444, 446 (6th Cir. 1999). Improper prosecutorial comments in isolation do not amount to a due process violation as grounds for habeas relief. *Wilson v. Janklow*, 528 F. Supp 359, 362 (D. South Dakota 1981).

Petitioner's argument that the prosecutor improperly attempted to use his involvement in other crimes as evidence of his guilt with regard to this murder presents a question of Michigan evidentiary rules and cannot form a basis for federal habeas relief. *See High v. Kemp*, 819 F. 2d 988, 996 (11th Cir. 1987); *See also Welch v. Burke*, 49 F. Supp. 2d 992, 1001-1002 (E.D. Mich. 1999) (Cleland, J.) (habeas petitioner's claim that evidence of prior bad acts improperly admitted at murder trial not cognizable in federal habeas review). Moreover, proof of motive in a prosecution for murder, although not essential, is always

relevant, and evidence of other acts to prove motive is admissible. *People v. Rice*, 235 Mich. App. 429, 440; 597 N. W. 2d 843 (1999); *lv. den.* ___ Mich. ___ (Mich. Sup. Ct. December 28, 1999). Evidence of petitioner's involvement with the co-defendants with the sale of crack cocaine was relevant as to the issue of their motive for going to Smith's house for the purpose of collecting money that she allegedly owed to Bias and Shelton for previous cocaine purchases. *See Jameson v. Wainwright*, 719 F. 2d 1125, 1127 (11th Cir. 1983) (evidence of defendant's involvement with the sale of drugs to a murder victim was clearly relevant to his motive, plan, and intent to kill the victim). Lastly, given the overwhelming evidence against petitioner, the prosecutor's conduct in eliciting testimony about petitioner's prior bad acts did not rise to the level of a constitutional violation so as to entitle petitioner to habeas relief. *Kirby v. Dutton*, 831 F. 2d 1280, 1283-1284 (6th Cir. 1987). Even if the prosecutor should not have referred to petitioner's drug dealing, her brief questions and comments did not materially contribute to petitioner's conviction and thus, habeas relief would be inappropriate. *United States ex. rel. Lee v. Flannigan*, 701 F. Supp. 143, 146 (N.D. Ill. 1988). Petitioner has failed to state a claim upon which habeas relief can be granted.

ORDER

Based upon the foregoing, IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE.**

/s/ Paul Borman
HONORABLE PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

Dated: MAR 29 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GARY SUDDUTH,

Petitioner,

v.

JIMMY STEGALL,

Respondent,

CIVIL ACTION
NO. 99-CV-73898-DT
HONORABLE
PAUL D. BORMAN

_____/

JUDGMENT

The above entitled matter having come before the Court on a Petition for Writ of Habeas Corpus, Honorable Paul D. Borman, a United States District Judge, presiding, and in accordance with the Memorandum Opinion and Order entered on March 29, 2000.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is, DISMISSED WITH PREJUDICE.

Dated at Detroit, Michigan, this 29, day of March, 2000.

DAVID J. WEAVER
CLERK OF THE COURT

BY: /s/ Jonie Parson
DEPUTY CLERK

APPROVED:

/s/ Paul Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GARY SUDDUTH,

Petitioner,

v.

JIMMY STEGALL,

Respondent.

Case No. 99-CV-73898-DT
PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

ORDER GRANTING IN PART AND DENYING IN PART A CERTIFICATE OF APPEALABILITY

(Filed May 5, 2000)

The Court, in a separate opinion and order, has denied Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254. An appeal of that denial would lie only if this Court (in the first instance) or the Court of Appeals grants Petitioner a certificate of appealability. For the reasons that follow, the Court grants petitioner a certificate of appealability on one of the issues raised in his petition.

I. Standard of Review

28 U.S.C. § 2253(c)(1)(A) and F.R.A.P. 22(b) state that an appeal from the district court's denial of a writ of habeas corpus may not be taken unless a certificate of appealability (COA) is issued either by a circuit court or district court judge. If an appeal is taken by an applicant

for a writ of habeas corpus, the district court judge shall either issue a certificate of appealability or state the reasons why a certificate of appealability shall not issue. F.R.A.P. 22(b).

In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that the issues raised are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Hence v. Smith*, 49 F. Supp. 2d 547, 549 (E.D. Mich. 1999) (Gadola, J.).

II. The Individual Claims.

A. Claim # 1. The trial court's refusal to allow petitioner to introduce an out-of-court statement made by a co-defendant which exculpated petitioner of this crime.

Petitioner first contends that the trial court deprived him of due process when she refused to allow him to introduce a statement made by co-defendant Bias at the calender conference, when he stated that he had acted alone in committing the crime and the other co-defendants had nothing to do with the commission of the crime. The Court denied petitioner's claim on the ground that it was denied by the state courts on the basis of an adequate and independent state law ground, namely a state procedural bar. Moreover, Petitioner, in the Courts' view failed to establish prejudice to avoid the state procedural bar because the claim itself was without merit.

Specifically the co-defendant's excluded out-of-court statement was unreliable because it was uncorroborated and was in conflict with the direct evidence presented at trial, including petitioner's confession to the police and his own testimony, both of which established petitioner's involvement in the crime.

The Court will nonetheless issue a certificate of appealability on this claim because a court could have resolved the question of prejudice in a different manner. Moreover, appellate review of this claim could provide important guidance to federal habeas courts in the Sixth Circuit on this issue. *See Laboy v. Demskie*, 947 F. Supp. 733, 745 (S.D.N.Y. 1996). Accordingly, a certificate of appealability will issue on petitioner's first claim.

B. Claim # 2. The prosecutorial misconduct claim.

Petitioner also claimed that the prosecutor engaged in misconduct and deprived him of a fair trial by eliciting testimony concerning his involvement in the sale of crack cocaine with the other co-defendants in this case. The Court rejected petitioner's claim first on the ground that the prosecutor's improper use of other acts evidence was a state law issue. The Court further found that because evidence of petitioner's involvement with the other co-defendants in the sale of crack cocaine was relevant as to their motive in attempting to collect a drug debt from the victim, it was not erroneous in admitting it into evidence. The Court finally held that in light of the overwhelming evidence against petitioner, the prosecutor's brief references to petitioner's involvement in the sale of cocaine did not materially contribute to his conviction.

A certificate of appealability is not warranted where a petitioner fails to show that a prosecutor's statements rose to the level of a substantial showing of the denial of a constitutional right. *Corwin v. Johnson*, 150 F.3d 467, 477 (5th Cir. 1998). Because petitioner has failed to show that the prosecutor's conduct rose to the level of a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability on this claim.

ORDER

For the reasons stated, the Court GRANTS a certificate of appealability with respect to petitioner's claim that he was not permitted to present evidence in support of his defense and DENIES a certificate of appealability with respect to the claim of prosecutorial misconduct.

SO ORDERED.

/s/ Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

DATED: MAY – 5 2000
Detroit, Michigan

EXHIBIT C

No. 00-1463
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY SUDDUTH, Petitioner-Appellant,	)	
v.	)	ORDER
JIMMY STEGALL, Warden, Respondent-Appellee.	)	(Filed May 24, 2000)

When a district court denies a habeas claim on procedural grounds without reaching the merits of the claim, a certificate of appealability (COA) may issue on the claim if the prisoner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 120 S. Ct. 1595, 1604 (2000) (finding lack of exhaustion and abuse of the writ to be procedural grounds, and thus subject to this two-part test).

In this case, the district court denied habeas relief on petitioner's first claim based on a state procedural ground; nonetheless, it granted a COA on this claim. Because the court did not have the benefit of the Supreme Court's decision in *Slack*, this case is hereby remanded to the district court for it to reconsider its COA order in light of the Supreme Court's opinion in *Slack v. McDaniel*.

Further proceedings in this case will be held in abeyance pending a ruling by the district court.

ENTERED PURSUANT TO RULE
45(a), RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk

/s/ Leonard Green fr

EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GARY SUDDUTH,

Petitioner,

v.

JIMMY STEGALL,

Respondent.
_____/

Case No. 99-CV-73898-DT
PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

ORDER DENYING A CERTIFICATE OF APPEALABILITY

(Filed May 26, 2000)

This matter is before the Court on remand from the Court of Appeals to reconsider this Court's earlier ruling on a certificate of appealability, in light of the Supreme Court's recent decision in *Slack v. McDaniel*, 529 U.S. ___ (Apr. 26, 2000). For the reasons that follow, the Court vacates its earlier grant of a certificate of appealability, and denies petitioner's request for a certificate of appealability on both issues presented in his petition.

BACKGROUND

Petitioner sought a writ of habeas corpus from this Court on two grounds, claiming that (1) the trial court improperly excluded exculpatory evidence and (2) that his conviction was tainted by prosecutorial misconduct. The Court denied the petition, holding that both claims were procedurally barred by petitioner's failure to raise

them in his appeal of right from the conviction. The Court also held, in the alternative, that Petitioner's claims were without merit and would not in any event entitle him to relief.

Petitioner timely noticed an appeal to the United States Court of Appeals for the Sixth Circuit and sought a certificate of appealability from this Court. In an order filed May 5, 2000, the Court granted petitioner a certificate of appealability on the claim of improperly excluded exculpatory evidence and denied a certificate of appealability on the claim of prosecutorial misconduct. In granting the certificate of appealability on the first issue, the Court held that reasonable jurists might have differed on the question whether petitioner had established cause and prejudice to avoid the state procedural bar to consideration of his habeas claim. As to the claim of prosecutorial misconduct, the Court held that on the merits, the claim did not rise to the level of a substantial showing of the denial of a constitutional right, so that no certificate of appealability was warranted.

In an order dated May 24, 2000, the Sixth Circuit remanded the certificate of appealability for reconsideration in light of the Supreme Court's April 26 decision in *Slack v. McDaniel*, 529 U.S. ___ (2000).

ANALYSIS

In *Slack*, the Court established the standards that govern the issuance of certificates of appealability in cases where the district court dismisses a petition for habeas corpus on procedural grounds, without reaching the merits of the petitioner's constitutional claims. The

Supreme Court held that to be entitled to a certificate of appealability in such a situation, the petitioner must show both that the district court's procedural ruling would be debatable among reasonable jurists, and that the underlying constitutional claim is one on which the resolution would be so debatable. *Slack*, slip op. at 8.

As the Court explained, "[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal." *Id.* A necessary implication of the Court's ruling is that if the Court finds one of the showings is not made, the COA must be denied, and the Court need not consider the other showing.

In this case, the Court denied a COA on the issue of prosecutorial misconduct, finding that on the merits it would not be debatable among reasonable jurists that petitioner had failed to make a substantial showing of the denial of a constitutional right. The Court adheres to that conclusion on reconsideration, and concludes that under *Slack* the COA must be denied because Petitioner failed to make at least one of the two required showings.

On the issue of the excluded evidence, the Court granted a COA because the Court found that reasonable jurists might have differently resolved the question whether Plaintiff was prejudiced and thus might have ruled differently on the procedural question. That is, the

Court concluded that Petitioner had made the first showing required by *Slack* – a ruling on the procedural question that was debatable among reasonable jurists. The Court did not, however, consider whether Petitioner had made the second required showing, whether Petitioner "state[d] a valid claim of the denial of a constitutional right". *Slack*, slip op. at 8.

The Court concludes that reasonable jurists could not differ on the merits of Petitioner's claim that the exclusion of exculpatory evidence denied him due process of law in his criminal trial. Accordingly, he has not made the second showing required by *Slack*, and the Court therefore VACATES its earlier grant of a certificate of appealability on this issue and now DENIES a certificate of appealability on both issues presented by the petition.

SO ORDERED.

/s/ Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

DATED: MAY 26 2000
Detroit, Michigan

EXHIBIT E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GARY SUDDUTH,

Petitioner,

v.

JIMMY STEGALL,

Respondent.

_____/

Case No. 99-CV-73898-DT
PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING A CERTIFICATE OF APPEALABILITY

(Filed Jun. 7, 2000)

The Court denied Petitioner's application for a writ of habeas corpus and he noticed an appeal. The Court originally granted a certificate of appealability on one of the two issues raised by the petition. The Court of Appeals for the Sixth Circuit remanded the certificate of appealabililty for reconsideration in light of the Supreme Court's intervening decision in *Slack v. McDaniel*, 529 U.S. ___ (Apr. 26, 2000). On remand, the Court denied a certificate of appealability by order of May 26, 2000 (Docket No. 32). The Court will deny the motion for reconsideration, both because the Petitioner has not met the burden imposed by Local Rule 7.1 (g) on motions for reconsideration, and because Petitioner's argument is without merit.

On a motion for reconsideration, the movant bears the burden of demonstrating a palpable defect by which

the Court or parties were misled. A motion for reconsideration that merely presents the same issues already ruled upon by the Court will not ordinarily be granted. Local Rule 7.1(g). The instant motion for reconsideration essentially argues that the Court misapplied *Slack*, and that the Court should reaffirm its original grant of a certificate of appealability. The Court has already ruled on the applicability of *Slack* to this case, so that the motion for reconsideration merely presents the same issues already ruled upon by the Court. It identifies no palpable defect by which the Court or the parties were misled.

Furthermore, even if the Court were to reach the merits of Petitioner's argument, it would reaffirm its holding on the applicability of *Slack* to the instant petition. The Supreme Court, in *Slack*, elaborated on the showing to be made before a certificate of appealability (COA) will issue. Where a district court denies a state prisoner's petition for a writ of habeas corpus, and does so without reaching the merits of the underlying constitutional claim, the petitioner must make two showings to obtain a COA. He must show that it would be debatable among reasonable jurists (1) that the district court incorrectly resolved the procedural issue on which it disposed of the petition and (2) that petitioner's underlying constitutional claim was meritorious. Where the district court reaches the merits of the constitutional claim in denying the petition, the first showing is, of course, not required.

Petitioner argues that Slack is inapplicable to this case, because the Court's order denying the petition *did* reach the merits of the petition. Petitioner is correct that the Court, as an alternative basis for its denial of the

petition, concluded that the petitioner's claims were without merit. However, that was an alternative holding in the interests of judicial economy. The first section of the Court's ruling on the petition found the claims barred by the state courts' reliance on an adequate and independent state law ground for denying relief.

In order for Petitioner to be entitled to appeal, he must make both showings required by *Slack*. To hold otherwise would be to treat the Court's holding on the procedural bar as a nullity, which it is not. It addresses a threshold showing that Petitioner must make. The Court's consideration of the merits of the petition was for the sake of judicial economy, in that it would permit appellate review without the need for remand should the Court of Appeals disagree with the Court's conclusion on the state procedural bar.

While the court's conclusion on the state procedural bar may be debatable among reasonable jurists, its conclusion on the merits would not be so debatable. Accordingly, petitioner has not met his burden under *Slack*, which the Court concludes is applicable to this case.

The Court therefore DENIES the motion for reconsideration.

SO ORDERED.

/s/ Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

DATED: JUN 7 2000
Detroit, Michigan

EXHIBIT F

No. 00-1463

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY SUDDUTH, Petitioner-Appellant, v. JIMMY STEGALL, Warden Macomb Regional Facility, Respondent-Appellee.	)	ORDER (Filed Jul. 12, 2000)

Before: MARTIN, Chief Judge.

Gary Sudduth, a Michigan prisoner proceeding through counsel, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The receipt of the notice of appeal is construed as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b).

Upon review, the court denies the application as to all issues.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green fr
Clerk

EXHIBIT G

Case No: 00-1463

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Jul. 21, 2000)

GARY SUDDUTH

Petitioner - Appellant

v.

JIMMY STEGALL, Warden Macomb Regional Facility

Respondent - Appellee

BEFORE: MARTIN, Chief Judge.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green bc
Leonard Green, Clerk